Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, JR., as PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, etc.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY.

BRIEF OF APPELLANT, CITY OF YONKERS.

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City of Yonkers

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Appellants,

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY.

Appeal from a Final Judgment of a Special United States Statutory District Court for the Southern District of New York Rendered on June 10th, 1943, at New York, N. Y.

BRIEF OF APPELLANT CITY OF YONKERS.

This is an appeal from a final judgment of a special United States District Court, Southern District of New York, rendered on June 10th, 1943, which denied appellants and Public Service Commission of the State of New York—State Department of Public Safety—, dismissing the complaint upon the merits, a permanent injunction to enjoin and set aside a certificate and order of the Interstate Commerce Commission authorizing The New York Central Railroad Company to abandon part of a line of railway between Van

Cortlandt Park Junction, New York, New York, and Getty Square, Yonkers, New York of approximately 3.1 miles

Opinion Below.

The opinion of the United States Statutory District Court for the Southern District of New York is in transcript of record (R. 385). Also judgment (R. 385).

Jurisdiction.

The Court below granted a temporary stay pending appellants' application for a temporary stay to this Court pending an appeal to this Court which had been perfected. (R. 388). Application was thereafter made to this Court for such temporary stay, and at the same time a motion was made on behalf of the United States of America to affirm the judgment of the Court below.

On June 21, 1943, an order was entered noting probable jurisdiction. (R. 400). See also statement as to jurisdiction filed with this Court dated June 14, 1943, and printed. The motion for a temporary stay was denied and also the motion to affirm.

Questions Presented.

(1) Whether the railroad sought to be abandoned here by the New York Central Railroad Company is a suburban or interurban electric railway and as such is not operated as a part or parts of a general railroad system of transportation and whether the Interstate Commerce Commission had jurisdiction or power to direct abandonment; and

(2) Whether the operating loss sustained by the New York Central Railroad Company constituted such an undue

burden on interstate commerce as to confer jurisdiction on the Interstate Commerce Commission, and

(3) Whether the loss constituted such an overriding interest of interstate commerce so as to give the Interstate Commerce Commssion jurisdiction instead of The New York State Public Service Commission although the proposed abandonment, consisting of only 3.1 miles, is only a curtailment of purely local service and the discontinuance of four railroad stations in the City of Yonkers and

(4) Whether the appellant City of Yonkers would be irreparably damaged by the abandonment of this line.

Statement.

The above entitled proceeding was instituted by an application of the New York Central Railroad Company to the Interstate Commerce Commission for a certificate that the present and future public convenience and necessity permit of the abandonment by the New York Central Railroad Company of part of a line of railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York. The part of the railroad which the New York Central seeks to abandon is marked in red on map. (R. 346).

The City of Yonkers appeared at a hearing on this application held in City Hall, Yonkers, New York, on November 12th, 1942 as a protestant against said application and as such protestant opposed the said application. (R. 176). After said hearing and on or about February 8th, 1943, a proposed report was filed by Lucian Jordan, one of the examiners for the Commission, in which said proposed report he recommended that the application of the New

York Central Railroad Company for the abandonment of said line should be granted. (R. 36).

On or about the 13th day of February, 1943, the City of Yonkers, New York, as a protestant excepted to the report and order proposed by said Examiner Jordan which exceptions were duly filed. (R. 37). A hearing was held by the Interstate Commerce Commission, Division 4, as to said proposed report at its office in Washington, D. C., on the 3rd day of March, 1943, on which day oral argument was heard as to said report and a transcript of that record is incorporated in our complaint in this action and marked "Exhibit H" by reference. (See also R. 366).

On or about the 20th day of March, 1943, the said Interstate Commerce Commission, Division 4, consisting of Commissioners Porter, Mahaffie and Miller, filed its report (R. 71 to 78) and issued a certificate or order (R. 78) directing the abandonment of said line and further ordered in said certificate or order that the abandonment should take effect and enforced from the date set forth in said order or certificate, viz., April 29, 1943.

The City of Yonkers on the 17th day of April, 1943, as a protestant, filed a petition with the said Commission for a review, rehearing and reconsideration and reargument of said order and also that the order of the Interstate Commerce Commission be stayed to a later date; that the execution of the first order was extended by orders dated April 19th, 1943 (R. 109) and May 29th, 1943. On May 10th, 1943, the Interstate Commerce Commission made its order denying the petition for rehearing without allowing the protestants an opportunity to appear (R. 110). Subsequent orders suspending the abandonment of the line were made and finally a temporary stay was granted by a United States District Statutory Court, Southern District of New York, until Saturday, June 19th, 1943, at midnight.

This temporary stay was granted so that the appellants could apply to this court for a stay pending appeal as previously stated.

Instead of hearing the application for a temporary injunction the Statutory Court decided to hear the permanent injunction suit upon the merits.

After a trial the Statutory Court granted judgment to the defendants and dismissed the complaint on the merits. It is from this judgment that the appellants appeal.

The appellants instituted this suit and were listed as parties and appeared in all of the proceedings before the Interstate Commerce Commission. The Public Service Commission of New York State was also a party. It did not appeal.

The appellant, City of Yonkers, sues on behalf of itself and its inhabitants. It is their claim and it is a fact that they would be irreparably damaged by the abandonment of said line. The branch which the defendant, the New York Central Railroad Company, proposes to abandon is called Yonkers Branch Putnam Division, New York Central Railroad Company (R. 333). It is an electric railway (R. 182) and is commonly known and designated by the defendant railroad company as the "Yonkers Branch." Its northerly terminus is at Getty Square in the City of Yonkers, from whence it proceeds generally in a southerly direction through the City of Yonkers to the boundary line between the City of Yonkers and the City of New York, where it enters Van Cortlandt Park in the City of New York and continues generally in a southerly direction within the City of New York to the southerly terminus of said line of railway at Sedgwick Avenue, New York City. The distance between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is 7.8 miles (See Exhibit No. 1A, R. 343).

The distance of the part of the line to be abandoned is 3.1 miles (R. 180).

At a point on said electric railway, 3.1 miles from Getty Square in Yonkers, there is a junction, known as Van Cortlandt Park Junction, where the so-called Putnam Division of the defendant railroad company joins said electric railway, as shown by this map Exhibit 1A (R. 343). From that point southerly to the Sedgwick Avenue terminus the steam trains of the Putnam Division operate over the same tracks as the electric railway. Northerly from Van Cortlandt Park Junction, the Putnam Division proceeds in a northeasterly direction as far as Brewster, N. Y., while the so-called Yonkers Branch proceeds in a northwesterly direction to Getty Square, Yonkers.

The trains of the Putnam Division are operated by steam (not electricity), and the Putnam Division is not electrified. Therefore, the electric trains of defendant railroad company which operate over the electric railway in question are not and cannot be operated over the Putnam Division; such electric trains are operated only between Getty Square, Yonkers, and Sedgwick Avenue in New York City.

In connection with its application to the Interstate Commerce Commission, defendant railroad company stated:

> "The line of railroad sought to be abandoned was constructed partly by Yonkers Rapid Transit Railway Company and The Yonkers Rapid Transit Railway Company and was completed by the New York and Northern Railway Company in 1888. *The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York*" (R. 15 and 182).

The line was electrified in 1926, and, in the words of a witness for the railroad company, "it was expected that

a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business (R. 182).

The electric trains are comprised of two, three or four cars, including the hauling car which is not a locomotive but is an "MU" (multiple unit) car. In addition to supplying the means of locomotion for the train the MU car has provision for carrying passengers of its own—it is "somewhat in the nature of a trolley car." The structure of the line is such that locomotives cannot be used thereon, and the line carries no freight whatever. In the words of the railroad company's witness: "You have got a line that is built primarily for con ater passenger business." (R. 209)

The line carried over 600 passengers (each way) daily at the time application for certificate was made.

For fifty-five years the said railroad has performed the function for which it was constructed, namely, the development of suburban business between the City of Yonkers and the City of New York.

In the year 1890 the population of the City of Yonkers was 32,033. The present population of the City of Yonkers is 142,000.

The part of the railroad proposed to be abandoned within the confines of the City of Yonkers has four stations, namely, Caryl, Lowerre, Park Hill and Getty Square.

In the course of these fifty-five years prosperous suburban real estate developments have been built up around these stations. There is a very large development around said Caryl Station. In addition to purely suburban and residential properties, large apartment houses have been erected in that section as well as stores and other business buildings. The same may be said about the growth of the City of Yonkers around the Lowerre Station. This is

known as the Lowerre Section of the City of Yonkers and in this section are suburban homes, large apartment houses and many substantial business places, churches and school. The next station is that known as Park Hill. The Park Hill Section on the easterly side of the railroad is purely residential and considered one of the most pretentious real estate developments in the City containing many substantial residences and is almost a community in itself, having its own social life centered around what is known as the Park Hill Country Club. The next station is Getty Square. This station is in the heart of the City of Yonkers and in Getty Square so-called are the largest and most pretentious buildings in the City. It contains all the main bank buildings and other business buildings. In recent years the Getty Square Station is contained in the First National Bank Building. This building also contains the main offices of the First National Bank. The upper floors are used for offices. It can be safely said that Getty Square is the hub and business center of the City of Yonkers. (R. 267 to 271)

This proposed abandonment would interrupt the orderly process of life of a large proportion of the people in these local communities mentioned for they have depended for many years in a large measure on the railway service furnished by the railroad which the defendant, New York Central Railroad Company, proposes to abandon. These local communities would not only lose this railroad service but in addition they would lose large sums in real estate values which would affect every property owner within the vicinity of this railroad proposed to be abandoned, and the resultant effect would be that the plaintiff, City of Yonkers, would also suffer great loss by reason of the diminution and loss of taxes. The testimony is that if this 3.1 miles par

of road is to be discontinued, it would cause a diminution in real property values of $2,700,000 (R. 284) and that the population of the City of Yonkers affected would be 38,204. (R. 270 to 271)

The proposed report of Examiner Jordan (R. 31) at (R. 35) endeavors to show the annual loss of operating the branch would be $56,941, based on the average revenues for 1940 and 1941, and concludes that this operating loss would impose an undue burden upon the carrier and upon interstate commerce. (R. 36 and 37)

Of course, this loss fails to take into consideration the tremendous increase in the net operating revenue of the company of the entire system in the last few years. (See Exhibit No. 4 to Return, R. 29.)

The main questions, and in all probability the main one, is, had the Interstate Commerce Commission the power to issue an order or certificate to abandon if the railway under consideration was a *street suburban* or *interurban electric railway* which was not operated as part or parts of a general steam railroad system of transportation.

The claim was asserted before the Interstate Commerce Commission before it finally acted in this matter that the Commission had no power to act because of these provisions contained in the Interstate Commerce Act (49 U. S. C. A., Section 1, subdivisions 18 to 22). (See Exhibits K, L and M in our Bill of Complaint, R. 79, 89, 92, 99.)

In any event, it is elementary that jurisdiction can be raised at any time, if not waived.

It made no finding as to the status of this railroad.

It is our belief that under the statute and its rules the United States District Statutory Court should have made specific Findings in this case which it did not do, and par-

ticularly it made no Finding as to the status of the railroad in question (R. 52 of F. R. C. P.).

We request the Court's indulgence and ask it to examine our statement as to jurisdiction, dated June 11th, 1943, which for the sake of brevity we will not print, and particularly paragraph 5, and the subdivisions thereof, and we also ask it to read our assignment of errors (R. 388, 389, 390 and 391), and particularly:

Specifications of Errors to be Urged.

We assert the Court below erred:

1. In failing to set aside and annul the order and certificate of the Interstate Commerce Commission dated March 20, 1943, as extended by orders made on April 19, 1943, and May 26, 1943 in Finance Docket #13194.

2. In failing to issue a permanent injunction setting aside, annulling and suspending said orders and certificate and enjoining and restraining the enforcement, execution and operation of said orders and certificate.

3. In failing to find that the so-called Yonkers branch, which the Interstate Commerce Commission authorized to be abandoned, is in fact and in law a suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation and that the Interstate Commerce Commission possesses no jurisdiction to entertain the application for or to act with respect to its abandonment.

4. In failing to find and decide that the Public Service Commission of the State of New York possesses exclusive jurisdiction with respect to the proposed discontinuance

of the four stations on said electric line in the City of Yonkers, New York, and with respect to the proposed abandonment of service over said electric line between Getty Square, Yonkers, and Sedgwick Avenue, New York City.

5. In failing to find and decide that the plaintiffs were denied a fair and adequate hearing by the Interstate Commerce Commission by reason of the denial of plaintiffs' applications for a further hearing or rehearing sought for the purpose of introducing evidence of materially changed conditions relating to facts found by the Commission as the basis for its determination and for the purpose of introducing newly discovered evidence which was not reasonably discoverable at the time of the original hearing before the Commission by the exercise of due diligence.

6. In failing to find and decide that the order of the Interstate Commerce Commission was wholly void and should be set aside because of the lack of basic or essential findings with respect to the jurisdictional question as to whether or not the line between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is a suburban or interurban electric railway not operated as a part or parts of the general steam railroad system of transportation.

7. In failing to find and decide that the findings made by the Interstate Commerce Commission were insufficient to sustain the conclusion that continued operation of the so-called Yonkers branch would constitute an undue burden upon interstate commerce and upon defendant, The New York Central Railroad Company.

8. In failing to find and decide that the action of the Interstate Commerce Commission in basing its determination upon findings which are unsupported by substantial evidence and in arriving at conclusions which are unsup-

ported by adequate findings was arbitrary and capricious and in violation of the legal rights of plaintiffs, and is wholly null and void.

POINT I.

The Interstate Commerce Commission had no jurisdiction to issue its Certificate and Order of Abandonment.

The jurisdiction of the Interstate Commerce Commission with respect to abandonments is found in Section 1, subdivisions 18 and 22, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, subds. 18, 22).

Subdivision 18 of Section 1 provides, in part, that:

> "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

This broad grant of authority is specifically limited by subdivision 22 of Section 1, which provides as follows:

> Sec. 1, par. (22) *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or *abandonment* of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or *of street, suburban, or interurban electric railways, which are not operated* as a part or parts of a general steam railroad system of transportation."

The report of Division 4 (Complaint Ex. I) (R. 71) shows that the Interstate Commerce Commission made no findings whatever with respect to the question of whether this line is a "surburban, or interurban electric railway * * * not operated as a part or parts of a general steam railroad system of transportation," which is specifically excluded by statute from the jurisdiction of said Commission with respect to approval of its abandonment.

If the line in question is a "suburban or interurban railway" as defined in subdivision 22 of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission has no jurisdiction to authorize its abandonment. Therefore, the Certificate and Orders of the Commission are null and void.

No findings were made by the Commission itself as to whether or not this line, as previously pointed out, between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is a suburban or interurban electric railway and no finding was made as to whether or not the line is "operated as a part or parts of a general steam railroad system of transportation," nor did the court below make any such finding.

In the entire record there is not one solid finding of fact stating just what type of railway this is.

In the cases in this Court we have read on this question, in relation to subdivision 22 of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Subd. 22) there has always been a finding by the Interstate Commerce Commission as to whether or not the railway in question came within or without the statute.

As was said in *Florida* v. *United States*, 282 U. S. 194 at page 215:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination * * * *but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.* The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

If there has been no such finding here how can the court pass upon a nonexistent finding?

The Commission before it proceeded should have first considered whether it had jurisdiction or not.

United States v. *Baltimore & Ohio R. Co.*, 293 U. S. 454.

Apart from that contention, we submit it is clear from the record made before the Interstate Commerce Commission that if it had found it had jurisdiction such a finding would have been wholly without substantial evidence to support it; and that, upon the undisputed facts as disclosed by such record, the line in question falls within the exception to the jurisdiction of the Commission as contained in subdivision 22 of Section 1 of the Interstate Commerce Act.

In a case involving the question of whether an abandonment authorized by the Interstate Commerce Commission constituted a "spur" within the meaning of the very statutory provision involved in this case, the Supreme Court said:

"*Whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision*

of a court—not to the final determination of either the federal or a State commission." (*United States* v. *Idaho*, 298 U. S. 105, 109).

In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission* (286 U. S. 299) the Court described a "suburban or interurban electric railway" in terms which are peculiarly significant and applicable to the facts of this case, as follows:

> "No difficulty is encountered in defining a street or a suburban electric railway. These are *essentially local*, are *fundamentally passenger carriers*, are *to an inconsiderable extent engaged in interstate carriage*, and *transact freight business only incidentally and in a small volume*. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distant communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. '*But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars.* Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads."

In the present case, it will be noted that *no freight whatever* is carried by the line in question. It is solely a passenger line—"* * * You have got a line that's not built for freight. You have got a line that is built primarily for commuter passenger business" (R. 209). There is no evidence in the record made before the Commission that it is engaged to *any extent whatever in interstate commerce*. It is "essentially local" and carries passengers between the

four stations in the City of Yonkers, to stations in the City of New York. It is operated by "single or series of self-propelled cars"—The "MU" car, and the undisputed evidence shows that ordinary locomotives cannot be operated over the line—"As I say, these bridges are too light for a locomotive" (R. 208).

The fact that the line was not originally constructed as an "electric railway," is, we submit, immaterial. So far as "abandonment" is concerned, the statute relates to *presently existing* "suburban or interurban railways" and there is nothing in the statute or in the decisions thereunder which purports to limit its application to railways which were originally constructed as electric railways. It might be urged that the line proposed to be abandoned is not individually owned and is the property of the New York Central Railroad Company. The cases seem to hold that the question of a single ownership is not controlling in interpreting the statutes involved herein.

In the development of transportation, steam railways, of course, preceded electric railways. When subdivision 22 was first enacted in 1920 (Transportation Act of 1920, c. 91, Sec. 402, 41 Stat. 478) there were undoubtedly in existence electric railways of the described class which were originally operated by steam and had later been converted to electricity when that source of motive power was introduced. Certainly no one would contend that such electric railways were not within the purview of subdivision 22 at the time of its enactment in 1920. Nor can it be said that subdivision 22 applies only to electric railways which were in existence at the time of its enactment. Such a construction would exclude electric railways thereafter constructed, contrary to the manifest intention of Congress to exclude from the jurisdiction of the Commission *all* electric railways within the described class. When the line in question was

electrified in 1926 the effect thereof, so far as the statutory provision is concerned, was exactly the same as though an entirely new line was constructed. Thereafter the line *constituted* a "suburban or interurban electric railway" and the provision in question became applicable thereto.

But one further question remains—is the line "*operated*" as a *part* or parts of a general steam railroad *system of transportation*"? We submit that this phrase relates to the situation where the "suburban or interurban electric railway" is an integral link in a steam railroad "system," the construction or abandonment of which would constitute an "extension" of such "steam railroad system of transportation" or an "abandonment" *pro tanto* of such "steam railroad system of transportation."

The so-called "Hudson Division" of the defendant railroad company affords an example. That division is a part of the line of the railroad between New York and Chicago. It is electrified from New York to Harmon, and passes through the City of Yonkers. An abandonment of the portion of that line between New York City and Yonkers would constitute an abandonment of a "portion of a line of railroad" within the meaning of subdivision 18 of Section 1 of the Interstate Commerce Act and although such portion is an "electric railway" running between the City of Yonkers and the City of New York and is, therefore, "interurban," it is also obviously "*operated* as a *part* or parts of a *general steam railroad system of transportation*" and, therefore, is not within the exception provided for in subdivision 22.

The so-called "Yonkers branch," on the other hand, is not "operated as a part" of defendant railroad company's Putnam Division or of any "general steam railroad system of transportation," albeit the Yonkers Branch and the Putnam Division trains pass over the same trackage as

far as Van Cortlandt Park junction. The trains of the "Yonkers branch" *cannot* pass over the Putnam Division to Brewster, because that line is not electrified beyond Van Cortlandt Park Junction; the Yonkers branch trains proceed *only* to Getty Square, Yonkers. Conversely the trains of the Putnam Division, which are drawn by steam locomotives, *cannot* proceed over the Yonkers branch to Getty Square, because the bridges on the electric line will not carry the locomotives.

The electric railway in question is not in any real sense operated as a "part" of the Putnam Division. It is a "commuters line" admittedly designed for the specific purpose of carrying commuters between their homes in Yonkers and their places of business in New York City. If the line were abandoned the Putnam Division would continue to operate as it has in the past, and the abandonment would not interfere in the slightest degree with such operation. On the other hand, service on the Putnam Division—the "general steam railroad system of transportation"—could be discontinued, and the "Yonkers branch," from Sedgwick Avenue, New York, to Getty Square, Yonkers, being electrified, could continue in operation. The two lines are wholly independent except for the fact that for a distance of approximately 4.7 miles they use the same track. That fact, we submit, is wholly immaterial; the situation, for the purposes of the statutory provision involved, is exactly the same as though a separate line of track, paralleling the existing track, were installed to carry the electric railway trains.

In the case at bar, as we have already pointed out, there is no finding whatever as to the status of that part of the Railroad to be abandoned.

As Mr. Justice Roberts said in the *Chicago, North Shore & Milwaukee Railroad Company* case, 288 U. S., at page 11:

> "As indicated in the Piedmont & N. R. Co. case, *supra*, the phrase 'interurban electric railway' may not in all circumstances be susceptible of exact definition. The Commission has realized the difficulty."

Mr. Justice Roberts then goes on to cite examples as to the uncertainty of the Interstate Commerce Commission in this respect.

We believe, in the first place, that the Interstate Commerce Commission had no jurisdiction over the line proposed to be abandoned. In the second place, that if it had it should have made a proper finding of fact that it had jurisdiction, so that the question of its jurisdiction could be properly raised. In the third place, we believe that the United States District Statutory Court erred in assuming that the Interstate Commerce Commission had jurisdiction in this case.

POINT II.

The operating loss sustained is not an undue burden upon the New York Central Railroad Company and Interstate Commerce.

In the proposed report of Examiner Jordan of the Interstate Commerce Commission (R. 34 at page 35) he estimated that the operating loss would be $56,941 for the years 1940 and 1941.

The Interstate Commerce Commission, Division No. 4 (R. 76) referred to this operating loss of $56,941 for the years 1940 and 1941.

As we said in our petition to the Interstate Commerce Commission (Ex. K, R. 79) for a re-hearing:

"1. *That the continuation of said part of line will not be an undue burden on interstate commerce.*

That the proposed report of Lucian Jordan, Examiner for the Commission, which was confirmed by the Commission in its order dated March 20th, 1943, contains this proposed finding on Sheet 5 of said report, lines 53-55, inclusive:

(fol. 86) 'Continued operation would impose an undue and unnecessary burden upon the applicant and *upon interstate commerce*'. (Italics ours.)

That the applicant in its Return to Questionnaire dated August 19th, 1942 included therein Exhibits designated in said Return to Questionnaire as Exhibits 3 and 4. That said Exhibit No. 3 shows a condensed general balance sheet of the New York Central Railroad Company as of May 31st, 1942. That said Exhibit No. 4 shows the condensed income account of the New York Central Railroad Company for the years 1937-1941 and for five months ended May 31st, 1942 (R. 29).

That according to this said Exhibit No. 4, the only year the applicant had a deficit was in the year 1938. That according to this exhibit, for the first five months in the year 1942 up to May 31st of that year, the net income was $11,351,125. That the said exhibit does not contain the full income account for the year 1942. That, therefore, it necessarily follows that it does not give a complete financial picture of the applicant's finances or operating income for the year 1942.

That since the hearing held in this proceeding on November 12th, 1942, a proceeding was instituted before the Interstate Commerce Commission, entitled 'Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942'.

That at hearings held in that case there were introduced in evidence Exhibits submitted on behalf of the Public Service Commission of the State of New York

known as Exhibits Nos. A-33 and A-34. That these Exhibits show the complete financial picture of the financial operations of the New York Central Railroad Company for the years 1941 and 1942.

That at page 5, table 11 of Exhibit A-33 there is set forth the net railway operating income after Federal and Canadian Income Taxes for the year 1941. That this amounts to the sum of $61,883,063. It excludes the sum of $4,464,303 for depreciation on B. & A. property applicable to a period prior to 1941. That Table 201 of Exhibit A-34 shows that in the year 1942 the net railway operating income of the company, after expenses and Federal Income Taxes amounted to $90,399,495.

(fol. 87) That those same exhibits (A-33, page 8, Table 14, and A-34, Table 203) show the annual rate of return earned by the New York Central Railroad Company on the book value of its property for the year 1942 after payment of all expenses and Federal and Canadian Income Taxes was 5.06% as compared with a return on the same basis for the year 1941 of only 3.46%.

That the report in the instant proceeding accompanying the certificate or order dated March 20th, 1943, shows, according to said report, that the estimated annual loss in operating part of said line which was sought to be abandoned was the sum of $56,941 based upon the average revenues of said line for the years 1940 and 1941.

That if this loss had been saved because of the fact that the Company was paying Federal and Canadian Income Taxes, the actual saving would have been $22,775 less, or a net loss to the Company of $34,165.00. Such a saving would have improved the rate of return earned by the Company of only 19/10000 of 1% (.00191148%). It is apparent that such an insignificant loss could not reasonably constitute a burden upon interstate commerce. That if the proposed reduction in assessments is made as outlined

below of $224,000 amounting to a tax saving of $8,772.76, the net loss would be correspondingly less.

That if the City of Yonkers, the protestants herein, were allowed to introduce the same figures included in said Exhibits Nos. A-33 and A-34 in Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942, in this proceeding at a rehearing of this case, it would show the true financial picture of the applicant and that its financial condition was getting better year by year, and that in the light of its increased earnings it could not correctly maintain that the loss which it allocates to the operation of that part of the line which it seeks to abandon would interfere in the slightest with interstate commerce, and that there is no overriding interest of interstate commerce to call for Federal interference directing abandonment.

That as we said above, the hearing in this proceeding was (fol. 88) held on November 12th, 1942. That these exhibits known as Nos. A-33 and A-34 were not prepared until February, 1943 so that they were not available at the hearing on this application which was held in the City of Yonkers, New York on November 12th, 1942 and, therefore, could not be introduced in evidence". (R. 81 to 83). (See affidavit of McGregor, R. 89 to 92).

POINT III.

There is no overriding interest of Interstate Commerce to call for Federal interference directing abandonment.

As we have shown above, there is no overriding interest of Interstate Commerce involved here.

The proposed abandonment of this line means a curtailment of local service and the discontinuance of four of its stations in the City of Yonkers, namely, Caryl, Lowerre,

Park Hill and Getty Square. If there is no overriding interest of interstate commerce, the power to regulate purely local service and discontinue stations is within the State (See Section 54 of the Railroad Law of the State of New York, as amended. Chapter 49 of the New York Consolidated Laws).

This Court has been diligent in preserving the powers of the States.

As said in the case of *Palmer* v. *Massachusetts*, 308 U. S., 79-96, in an opinion written by Mr. Justice Frankfurter, pages 83, 84 and 85:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.
>
> To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative

policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. Minnesota Rate Cases (Simpson v. Shepard) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA (NS) 1151, Ann Cas 1916A 18; cf. Kelly v. Washington, 302 US 1, 82 L ed 3, 58 S Ct 87.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, Colorado v. United States, 271 US 153, 70 L ed 878, 46 S Ct 452, this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. Re Kansas City S. R. Co. 94 Inters Com Rep 691; see Re Morris & E. R. Co. 175 Inters Com Rep 49."

POINT IV.

The proposed abandonment of the railroad in question would cause great hardship and irreparable damage to the City of Yonkers and its inhabitants.

The proposed report of Examiner Jordan tends to show the manner in which the City of Yonkers and its inhabitants would be affected by this proposed abandonment. We quote from his report (R. 31 at 34 and 35):

"The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the

branch is somewhat more extensive than that assigned by the applicant, and that the population thereof was 38,204 in 1940. The assessed value of the land and improvements of the area is $27,901,250. A real estate broker of Yonkers testified that in his opinion that valuation would be decreased approximately 10 percent if the line is abandoned".

This would mean a loss in valuation, according to our real estate expert of $2,790,125.

In addition to this loss of real estate value, this curtailment of service at this time would mean great inconvenience to the travelling public. This Court can take almost judicial notice of the over-crowding of all means of transportation, railroad trains, street cars and busses. The affidavit of the War Transportation Administrator of the City of Yonkers illustrates this point. (R. 371, 372)

The record without further comments proves the damage and hardship this abandonment would cause the Appellant City and its inhabitants.

POINT V.

The judgment of the court below should be reversed, and the permanent injunction prayed for granted.

Respectfully submitted,

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